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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAY PRINTZ,
Sheriff/Coroner, Ravalli County, Montana,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

RICHARD MACK,
Sheriff, Graham County, Arizona,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO), a federation of 75 national and international unions representing more than

13,000,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for by the Rules of this Court.

SUMMARY OF ARGUMENT

Petitioners base their constitutional challenge to the Brady Act not on the text of the Constitution, but on state sovereignty "postulates," p. 6 *infra*, which are said to lie behind the text. It is true that the Constitution creates a system of dual sovereignty. But it is equally true that within the area of enumerated powers delegated to the federal government that government is supreme. It was the Framers' plan that the constraint on the federal government's exercise of its delegated powers and the protection of state authority from such exercise is nothing more, or less, than the political will of the people.

From its earliest days, this Court has understood the constitutional scheme thusly and has upheld federal laws enacted pursuant to an enumerated power without regard to their impact on the States. In recent years, this constitutional understanding has been put into question, as the Court has in various ways sought to cabin Congress' Commerce Clause powers based on considerations of state sovereignty. The Court, by its own assessment, has tread "an unsteady path," p. 10 *infra*, in that effort. In large part that is because, in our constitutional system, the States are not sovereign in any previously-known sense of the term. As a result, the Court has confronted the greatest perplexities in fashioning a principled state sovereignty limit on the enumerated powers of Congress.

The one Commerce Clause area in which, under the decided cases, state sovereignty concepts do come into the constitutional calculus is when Congress "use[s] the States as implements of regulation." P. 12 *infra*. Taking that as a proper starting point, we show that for two independent reasons the statute at issue here does not "use

the States" in a way which impermissibly invades state sovereignty.

First, the Brady Act imposes obligations not on the States, but on the "chief law enforcement officer ("CLEO") of the place of residence" of a would-be handgun purchaser. In general, the CLEO is a local—rather than a state—official, and in this case the *only* petitioners are two county sheriffs who are not officers of the State and who do not have standing to assert the rights of any state officers who might be covered by the Brady Act.

In the context of the Eleventh Amendment—which is, of course, an expression of state sovereignty—this Court "has consistently refused to . . . afford protection to political subdivisions such as counties and municipalities." P. 14 *infra*. And, if the judicial power of the United States can be exercised over counties notwithstanding the express recognition of state sovereignty contained in the Eleventh Amendment, there is nothing in the unstated "postulates" of the Constitution to prevent the legislative power from being exercised over these very same bodies.

Second, even if, *arguendo*, the Brady Act were addressed to the States, the duties that Act imposes do not offend core notions of state sovereignty. The Constitution does not allow the Congress to "commandeer[] the legislative process of the States." P. 17 *infra*. But the Brady Act does not do so: it imposes a "ministeral mandate," p. 19 *infra*, which requires state officials to participate, in a limited way and for a limited time, in administering a federal law embodying a clear, explicit and complete set of federal policy judgments.

The Framers of the Constitution contemplated that state officials would be used in this way by the federal government, as *The Federalist Papers* make clear. Indeed, numerous early federal statutes imposed administrative duties on the States. And whereas commandeering state

legislative power undermines the "distinct and discernable lines of political accountability" which are necessary to the federal system, p. 23 *infra*, a "ministerial mandate" like the one at issue here, does not do so. Indeed, this mandate is analytical quite similar to other mandates which have been upheld by this Court.

It is not necessary to dispose of the instant case to go so far as to hold that a mandate to state officials to assist in the administration of a federal law is *always* constitutionally permissible. Rather, given that the mandate here imposes a limited burden for a limited, interim period of time on local officials and does so in the service of a vitally-important federal regulatory interest which cannot be advanced without State involvement, it is enough here to hold that ministerial mandates are not *per se* unconstitutional and that in the instant case the federal interests so clearly predominate as to permit this mandate.

ARGUMENT

Congress Acted Within Constitutional Limits in Requiring Local Law Enforcement Officials, During an Interim Period Until a National System Is Created, to Conduct Limited Investigations of Would-Be-Purchasers of Handguns as Part of a Federal Program to Regulate Handgun Sales

A. Introduction

The Brady Act, P.L. 103-159, establishes a set of rules to regulate the sale of handguns by federally-licensed importers, manufacturers, and dealers of firearms. *See* 18 U.S.C. § 922(s). The question posed here is whether, in enacting certain of those rules, Congress exceeded its constitutional authority.

It is beyond dispute that the firearms industry in all its interrelated manufacturing, transportation and sales facets, is one that " 'substantially affects' interstate commerce," *United States v. Lopez*, —— U.S. ——, 115 S.Ct. 1624,

1630 (1995). The sale of such an inherently dangerous product, made for and moved in commerce, is thus a proper object of federal regulation under the Commerce Clause. Neither petitioners nor their supporting *amici* seriously claim otherwise.

Petitioners and their *amici* likewise do not seriously contend that, in the instant exercise of its Commerce Clause power, Congress transgressed an express limitation on its authority such as those contained in the Bill of Rights. To be sure, the briefs on the other side do invoke the Tenth Amendment. But that Amendment states a "tautology," *New York v. United States*, 505 U.S. 144, 157 (1992), or a "truism that all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941). The Tenth Amendment, in other words, "was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people" and "added nothing to the instrument as originally ratified." *United States v. Sprague*, 282 U.S. 716, 733 (1931).[1] Indeed, the framers of the Tenth Amendment squarely rejected a proposal to provide that power not "expressly" delegated to the federal government be reserved to the States for fear that such a proposal would work a substantive change in the constitutional scheme by

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[1] In proposing the Tenth Amendment to the First Congress, Madison stated:

> I find from looking into the amendments proposed by the States conventions that several are particularly anxious that it should be declared in the Constitution that the powers not herein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allows that the fact is as stated. I am sure I understand it so, and I do therefore propose it. [*History of Congress* 441 (June 8, 1789)]

negating federal powers that might arise "by implication." I *Annals of Cong.* 790.[2]

Lacking any basis in the constitutional text for the claim that Congress exceeded its constitutional authority, petitioners bid this Court to set out in a ship without a rudder, under a sky without a guiding star, on a boundless constitutional sea. Petitioners rest their case on state sovereignty "postulates" which are said to lie "[b]ehind the words of the constitutional provisions." *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). But because those postulates point in too many directions at once to guide the way, we would be derelict if we did not begin by underlining what a perilous voyage petitioners propose for a court of law charged with interpreting a written Constitution.[3]

1. Petitioners begin from the proposition that the Constitution is a "system of dual sovereignty"—" 'an indestructible Union, composed of indestructible States.' " *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). As Justice Kennedy has put the point, "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and federal each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, —— U.S. ——, 115 S.Ct. 1842, 1872 (1995) (Kennedy, J., concurring).[4]

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[2] *See also Ashwander v. TVA*, 297 U.S. 288, 330 (1936); *Wright v. Union Central Ins. Co.*, 304 U.S. 502, 516 (1938); *Case v. Bowles*, 327 U.S. 92, 101-02 (1946); *Sperry v. Florida Bar*, 373 U.S. 379, 403 (1960).

[3] *See also* Justice Frankfurter's warning in *New York v. United States*, 326 U.S. 572, 581 (1946):

> Any implied limitation upon the supremacy of the federal power . . . brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges

[4] Perhaps the best articulation by the Framers of the theory underlying dual sovereignty is found in Madison's *Federalist Paper* No. 51, which the Court quoted in *Gregory*:

At the same time there is an equal and opposite postulate, no less important to the constitutional structure than the first: that within the area of enumerated powers delegated to the federal government, that government is supreme. This postulate finds its most concrete expression, of course, in the Supremacy Clause. And, that Clause in turn embodies a broader understanding stated by Madison:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States. [II *Annals of Cong.* 1897]

Madison did not blink at the implications of this second postulate for the first. *Federalist Paper* No. 45 (p. 288) poses the question of whether "the powers transferred to the federal government . . . will be dangerous to the portion of authority left in the several States." Madison's answer (in *Federalist Paper* No. 46) is straightforward: such a possibility is inherent in the Constitution's plan; the constraint on the federal government's exercise of its delegated powers and the protection of state authority from such exercise is nothing more, or less, than the political will of the people.

In Madison's words, the "ultimate authority" in determining how far the federal government might go in exercising its delegated powers, "resides in the people alone," and that being so "it will not depend merely on the comparative ambition or address of the different govern-

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In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. [*The Federalist Papers* No. 51, p. 323 (C. Rossiter ed. 1961)]

ments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other." *Federalist Paper* No. 46, p. 294. If, as seemed most unlikely to Madison, the "people should in future become more partial to the federal than to the State governments . . . the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due." *Id.* pp. 294-95.

In short, the framers "were willing to confront an inevitably powerful opposition to ratification based on the popular fear of centralized government, even at the risk of losing all, precisely because they thought all had been nearly lost already." [5]

From its earliest days, this Court has understood the constitutional scheme thusly. Since *McCulloch v. Maryland*, 4 Wheat. 316 (1819) and *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the basic principle has been that "the

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[5] Scheiber, *Federalism and the Constitution: The Original Understanding in* L. Friedman & H. Scheiber (eds.), *American Constitutional Law and Order* 86 (1978).

Indicative of this philosophy, the Constitutional Convention defeated a proposal which would have precluded Congress from "interfer[ing] with the government of the individual states in any matter of internal policy which respect the government of such states only." W. Murphy, *The Triumph of Nationalism* 179 (1967). The Constitutional Convention also came within one vote of adopting a proposal which would have authorized Congress to "negative" (i.e. veto) any state law, II M. Farrand (ed.), *The Records of the Federal Convention* 391 (1911), and even those who opposed this proposal did so on the ground that, in light of the Supremacy Clause, it was "unnecessary," II *id.* at 350 (Mr. Sherman), 391 (Mr. Williamson and Mr. Gouverneur Morris). And after the Constitution was ratified, the first Congress, in drafting the Bill of Rights, adopted recommendations from the States that were protective of individual rights, but rejected all recommendations aimed at enhancing state sovereignty at the expense of federal authority, such as proposals by New York, Massachusetts and Virginia to limit the federal taxing power and the federal power to regulate congressional elections. W. Murphy, *supra*, at 337, 368, 385.

government of the Union, though limited in its powers, is supreme within its sphere of action," *McCulloch*, 4 Wheat. at 405, and that to the extent Congress exercises an enumerated power, such as its power over interstate commerce, the "wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are . . . the sole restraints on which they have relied to save them from its abuse," *Gibbons*, 9 Wheat. at 197.

Under this understanding, "[w]henever . . . a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided." *United States v. Harris*, 106 U.S. 629, 636 (1883). "The power of Congress . . . is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or states is not material to be considered." *Hoke v. United States*, 227 U.S. 308, 320 (1913). And, with particular regard to the Commerce Clause power, "there is no . . . limitation upon the plenary power to regulate commerce"; a "state can no more deny the power if its exercise has been authorized by Congress than can an individual." *United States v. California*, 297 U.S. 175, 183-84, 185 (1936).[6]

2. We recognize that this constitutional understanding has been put into question over the past twenty years. That

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[6] It was on this basis that the Court in *United States v. California* sustained federal regulation of state-owned railroads. *See also California v. Taylor*, 353 U.S. 553 (1957); *Parden v. R. Terminal Co.*, 377 U.S. 184 (1964). And, it was on this basis, too, that the Court upheld federal regulation of state-owned waterfront terminals, *California v. United States*, 320 U.S. 577 (1944), and the application to the States of wage and price controls, *Case v. Bowles*, 327 U.S. 92 (1946); *Fry v. United States*, 421 U.S. 542 (1975). *See also Sanitary District v. United States*, 266 U.S. 405 (1925) (federal government may limit the amount of water Illinois could withdraw from Lake Michigan); *Oklahoma v. Atkinson*, 313 U.S. 508 (1941) (federal government may flood state-owned land to build a dam).

reassessment has stemmed from a concern that the commerce power has proved so protean in its possibilities in a political economy formed by modern financial, communications, production and transportation techniques as to pose a qualitatively different federal threat to state authority than any posed in the past. *But see United States v. Lopez, supra.*

Thus, in *National League of Cities v. Usery*, 426 U.S. 833, 841-43 (1976), the Court proceeded on the theory that a law "may be fully within the grant of legislative authority contained in the Commerce Clause," but if that law "impairs the States' integrity or their ability to function effectively in a federal system," the law may "transgress[]" what the *National League* Court deemed to be "an affirmative limitation on the exercise of [congressional] power" located in the Tenth Amendment. More recently, the Court has posited that the Commerce Clause power is not plenary but itself contains a state sovereignty limitation. *See New York*, 505 U.S. at 155-57.

Whatever the theory, the Court's jurisprudence in this area has "traveled an unsteady path." *Id.* at 160. That unsteadiness, we submit, is not a happenstance but is directly explained by the elusive nature of the "state sovereignty" concept.

"Sovereignty," Webster's tells us, means "supreme power." Yet in the United States, the States are *not* supreme in any previously-known sense of that word. The Constitution itself denies the States certain powers which, in the law of nations, would plainly be viewed as "incidents" of sovereign supremacy, such as the power to mint coints, to declare war and the like. *See* U.S. Const. Art. I, § 10.

Equally to the point, the law of nations teaches that statutes duly enacted by a sovereign are the law of the land. But, under the Supremacy Clause, there is no doubt that Congress can, without impermissibly invading state sovereignty, "displace or pre-empt state laws regulating

private activity affecting interstate commerce when these laws conflict with federal law," and can likewise "prohibit all—and not just inconsistent—state regulation of such activities." *Hodel v. Virginia Surface Mining & Recl. Assn*, 452 U.S. 264, 290 (1981). "Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Id.*

Similarly, since *Garcia v. San Antonio Metr. Transit Auth.*, 469 U.S. 528 (1985), it has come to be understood that "subject[ing] state governments to generally applicable laws"—that is "to the same legislation applicable to private parties"—does not impermissibly invade state sovereignty. *New York*, 505 U.S. at 160. While we believe that *Garcia* stands for more than that, it certainly means that much, and rightly so. After all, given the size of the public sector in relation to the overall economy, the "effectiveness of federal action" in regulating a particular market or a particular class of economic activity "would . . . be[] drastically impaired" if state actors who participate in that market or activity are *ipso facto* "left outside the reach" of such federal laws. *Fry v. United States*, 421 U.S. at 548. And, precisely because there is no basis for believing that generally applicable legislation regulating a market or a class of economic activity—as distinguished from statutes addresesd solely to the States—can pose a serious threat to the integrity of the "States as States," there is no basis for "drastically impair[ing]" the commerce power by erecting a state sovereignty shield against such legislation.

These deviations from any known concept of sovereignty demonstrate the conceptual difficulties inherent in any attempt to construct a principled state sovereignty limit on the enumerated powers of Congress—an attempt made all the more problematic by the absence of any guidance in the Constitution's text, the records of the Constitutional Convention, or in any other authoritative constitutional source.

As we stated at the outset, all of this—at the very least—bespeaks the need to proceed with the most cautious circumspection.[7] At the same time, after the divided opinions in *FERC v. Mississippi*, 456 U.S. 742 (1982) and *New York v. United States, supra*, the one Commerce Clause area in which state sovereignty concepts do most assuredly come into the constitutional calculus is when Congress "use[s] the States as implements of regulation." *New York*, 505 U.S. at 161.

Without a doubt the Brady Act does so—albeit in a limited way and for a limited time. But, as we proceed to show, for two independent reasons, the statute at issue here does not "use the States" in a way which impermissibly invades state sovereignty.

B. Commands Addressed to Local Law Enforcement Officials, Such as the County Sheriffs Who Are Petitioners Here, Do Not Impermissibly Infringe State Sovereignty

In both *FERC* and *New York*, the statutes at issue, by their very terms, imposed obligations directly upon the States. In *FERC*, the Public Utility Regulatory Policies Act of 1978, P.L. 95-617, 92 Stat. 3117, required "each *State* regulatory authority" to make certain determinations, 16 U.S.C. §§ 2621(a), 2622(a), 2623(a), and to "implement" certain rules promulgated by FERC. And in *New York*, the Low-Level Radioactive Waste Policy Amendments Act of 1985, P.L. 96-573, 94 Stat. 3347, provided that "If a *State* . . . is unable to provide for the disposal of . . . waste . . . each *State* in which such waste is generated . . . shall take title to the waste, be obligated

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[7] In other contexts, this Court has sounded a similar warning. *See, e.g., Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989) (criticizing rule "not found in the text of the Constitution or in any place else one would expect to find a constitutional principle" on the grounds that "the bounds of the inquiry" under such a rule are "essentially indeterminate" and results in "a web of legal rules that are increasingly intricate" and which bear little "resembl[ance to] . . . a body of constitutional doctrine").

to take possession of the waste, and shall be liable for all damages . . . incurred . . . as a consequence of the failure of the *State* to take possession." In both cases the statute was challenged by a State, represented by the State Attorney General. The sole question thus posed, given the Court's understanding of the Commerce Clause, was whether the State obligations at issue were incompatible with "core notions of state sovereignty."

In the instant case, in contrast, there is a threshold question which must be addressed. The Brady Act places obligations not on the States, but on "the chief law enforcement officer of the place of residence of the [proposed] transferee." 18 U.S.C. § 922(s)(1)(A)(i)(III), (s)(2). The "chief law enforcement officer" ("CLEO") is defined by the Act as "the chief of police, the sheriff, or an equal officer." 18 U.S.C. § 922(s)(8). In most (if not all) cases, then, the CLEO will be a *local*—rather than a state—official. And in this case in particular, the *only* petitioners are two *county* sheriffs who, under Montana and Arizona law, plainly are *not* officers of the State,[8] and who have standing to asset only their "own legal rights and interests," and *not* those of "third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1979).[9]

The question thus arises: do congressional commands to localities stand on the same state sovereignty footing as commands to States?

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[8] Montana and Arizona law both define the office of "sheriff" as a "county office," Mont. Code § 7-4-2203; Ariz. Rev. Stat. § 11-401, and make clear that it is the county—and not the State—that is responsible for funding, Mont. Code § 7-4-2502(1); Ariz. Rev. Stat. § 11-60; and supervising, Op. Mont. Att'y Gen. No. 38-85 (1980); Ariz. Rev. Stat. § 11-251.1, these offices.

[9] In narrowly limited circumstances, this Court has permitted a litigant to enjoy *jus tertii* standing. But assuming *arguendo* that there are any state officers who are covered by the Brady Act as CLEOs, petitioners have not "identified any obstacle preventing [such state-officer CLEOs] from asserting claims on their own behalf," nor have petitioners shown any "special relationship" with such hypothetical individuals. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

So far as we can ascertain, there are no decisions of this Court directly on point.[10] But this Court's Eleventh Amendment jurisprudence, if not directly controlling, is surely instructive and inexorably leads to the conclusion that state sovereignty interests are *not* implicated here.

The Eleventh Amendment is an express provision which "embodies" the "principle of state sovereignty." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). It is "rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty" and it "accords the States the respect owed them as members of the federation." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, —— U.S. ——, 113 S.Ct. 684, 689 (1993). And, this Court has given that Amendment a sweep that goes far beyond its literal words—one that protects States from suit in federal court not only by citizens of other states but equally by their own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

Against this background, it is highly relevant that since the very day that *Hans v. Louisiana* was decided, *see Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), to this, "the Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities." *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 401 (1979). Even though "such entities exercise 'a slice of state power,'" *id.*, and even though "ultimate control . . . resides with the State [which] may destroy or

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[10] In *National League of Cities*, 426 U.S. at 855-56 n.20, the Court, in a footnote, asserted that congressional laws "interfer[ing] with integral governmental services" provided by political subdivisions are "beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself." But *National League of Cities* was, of course, overruled by *Garcia*, albeit on the broader ground that Congress can regulate both States and localities. After *Garcia*, we do not believe that the footnote in *National League of Cities* is authoritative on the issue discussed in text.

reshape any unit it creates," nonetheless "cities and counties do not enjoy Eleventh Amendment immunity," *Hess v. Port Authority Trans-Hudson Corp.*, —— U.S. ——, 115 S.Ct. 394, 404 (1994). Rather, cities and counties are understood to be separate and distinct entities so that a suit against such an entity is not the same as a suit against the State.[11]

Similarly, in defining the parameters of the act of state doctrine under the antitrust laws, as formulated in *Parker v. Brown*, 317 U.S. 341 (1943), this Court has drawn a sharp line between actions of States and actions of local governments exercising state-derived authority. In *Community Communications Co. v. Boulder*, 455 U.S. 40, 53-54 (1982), the Court explained:

> The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitations: Ours is a "*dual* system of government," *Parker*, 317 U.S. at 351 (emphasis added), which has no pale for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographic limits of the United States" resides either with "the Government of the United States or the States of the Union."

The same principles control here. If the judicial power of the United States can be exercised over counties notwithstanding the express recognition of state sovereignty contained in the Eleventh Amendment, then surely there is nothing in the unstated "postulates" of the Constitution

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[11] *See also Old Colony Trust Co. v. Seattle*, 271 U.S. 426 (1926); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *cf. Moor v. County of Alameda*, 411 U.S. 693 (1973) (unlike States, political subdivisions are "persons" for diversity purposes); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) (political subdivisions are "persons" under 42 U.S.C. § 1983).

to prevent the legislative power from being exercised over these very same bodies.

Simply stated, the fact that the Sheriffs of Ravalli County, Montana and of Graham County, Arizona have been directed to perform certain duties by Congress does not in any respect threaten the state sovereignty of Montana or Arizona.

C. The Brady Act's Requirement That, Until the Federal Government Is Able to Develop a National System, Law Enforcement Officials Must Make a "Reasonable Effort to Investigate" the Lawfulness of Proposed Handgun Sales, Does Not Unconstitutionally Infringe State Sovereignty

Even if, *arguendo*, the Brady Act were addressed to the States, it still would be constitutional. For the conjunction of *FERC* and *New York* teach that not every action by Congress enlisting the States in federal regulation offends core notions of state sovereignty. And, the mandate at issue here is qualitatively different from the mandate that was imposed on the States in *New York* and more like the duties upheld in *FERC*. Accordingly, it is *FERC* and not *New York* that is controlling here.

1. In *FERC*, the Court sustained provisions of a federal law which imposed two discrete duties on "State regulatory authorities": first, a duty to "implement" (by adjudicating cases arising under) rules promulgated by the Federal Energy Regulatory Commission ("FERC"); and second, a duty to "consider" certain federally-proposed approaches to rate regulation.

Relying on *Testa v. Katt*, 330 U.S. 386 (1947), this Court reasoned that "the Federal Government has some power to enlist a branch of state government—there [in *Testa*] the judiciary—to further federal ends." 456 U.S. at 762. And, the *FERC* Court concluded that "enlisting" a state administrative agency to enforce, through adjudica-

tion, federally-promulgated rules and to "consider . . . suggested federal standards" does not "threaten the States' 'separate and independent existence,' and does not impair the ability of the States 'to function effectively in a federal system.' " *Id.* at 765-66, *quoting National League of Cities*, 426 U.S. at 852.

The Low Level Radioactive Waste Policy Amendments Act at issue in *New York*, was of a different character. There, Congress identified a problem—the disposal of low-level radio active waste--but did *not* provide a solution; instead Congress commanded the States to solve the problem. Congress' sole contribution was to impose sanctions on those States which failed to do so in the form of the "take title" provision. As a consequence, the States faced a choice between "regulat[ing] according to one federal instruction" or "submit[ting] to another federal instruction. Either way," the Court reasoned, " 'the Act *commandeers the legislative processes of the States* by directly compelling them to enact and enforce a federal regulatory program.' " 505 U.S. at 176 (emphasis added).

It was this vice—stated in various different ways at various points in the Court's opinion [12]—that led the Court to conclude that Congress had "infring[ed] upon the core of state sovereignty" in a manner "inconsistent with the federal structure of our Government." 505 U.S. at 177. The inconsistency, the Court explained, lay in the fact that "where the Federal Government compels States

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[12] *See* 505 U.S. at 161 (interpreting *Hodel* as resting on the proposition that the law at issue there "did *not* 'commandeer' the States into regulating mining"); *id.* at 162 (interpreting *FERC* as upholding the law challenged there because " '[t]here was nothing . . . 'directly compelling' the States to enact a legislative program"); *id.* ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"); *id.* at 166 ("where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts").

to regulate, the accountability of both state and federal officials is diminished." 505 U.S. at 168. The Court elaborated by drawing the following contrast:

> If the citizens of New York . . . do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. [*Id.*]

On the other hand:

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. [*Id.* at 169]

In sum, "[a]ccountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation." *Id.*

2. The Brady Act is quite unlike the statute at issue in *New York*. In enacting the Brady Act, Congress declared it to be the policy of the federal government to bar the sales of handguns to individuals meeting certain criteria. Congress further made it federal policy to establish a five-day waiting period between the time a purchaser applies to purchase a handgun and the time the gun can be sold. Congress took full and complete responsibility for these policy determinations (as several former Members of Congress can attest).

Congress likewise took steps in the Brady Act to assume full responsibility for the administration of the law

by directing the Attorney General to establish a "national instant criminal background check system" which, once operational, will be used during the waiting period to determine whether a sale would be lawful. P.L. 103-159, § 103. The Act authorizes the appropriation of such funds as are needed to implement this section. *Id.* § 103(k). But recognizing that the federal government at present lacks the information needed to pass upon the lawfulness of proposed handgun sales, Congress enacted what the law itself terms an "interim provision," *id.* § 102 (a), which, until the national system is operational, obligates CLEOs to make "a reasonable effort to ascertain" whether the proposed sale would violate the federally-established standards, *id.* § 102(a)(2). This is the sole obligation the Act imposes on CLEOs. And, the Bureau of Alcohol, Tobacco and Firearms has defined the "reasonable effort" required by the Act as, at most, requiring CLEOs to "check commonly available records."[13]

The obligation imposed by the Brady Act thus falls within the category of what one commentator has denominated a "ministerial mandate": Congress has "fully specif[ied] the private rules of behavior Congress wants to impose," and Congress has required only that state administrative officials assist in "implement[ing] those federally

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[13] Bureau of Alcohol, Tobacco and Firearms, Open Letter to State and Local Law Enforcement Officials (January 21, 1994). BATF adds:

> The level of research may justifiably vary among law enforcement agencies. In rural, sparsely populated counties where many handgun purchasers are personally known to the CLEO, little or no research may be necessary in many cases. In densely populated urban areas, every potential buyer might be run through the available computer records to determine whether any disqualifying information is on file. Each law enforcement agency serving as the CLEO will have to set its own standards based on its own circumstances, *i.e.* the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction.

defined rules through relatively ministerial enforcement action." [14] These obligations bear a much closer resemblance to the mandates upheld in *FERC* than to those overturned in *New York*.

Against this background, the ultimate question posed here may be restated as follows: notwithstanding *FERC*, should the rule of *New York*—which by its terms and its theory is limited to cases in which the federal government "commandeers the [state] legislative process by compel-[ling] the States to regulate"—be extended to reach cases, like the instant one, in which a federal command requires state officials (still assuming CLEOs to be officials of the State) to participate in *administering* a federal regulation embodying a clear, explicit and complete set of federal policy judgments? As we proceed to show, such an extension would loose the *New York* rule completely from its moorings.

3. The *New York* Court was of the view that in "opt[ing] for a Constitution in which Congress would exercise its legislative authority directly over individuals," the Framers both vouchsafed Congress the power "to pass laws requiring or prohibiting certain acts" and foreclosed Congress from "compel[ling] the States to require or prohibit those acts." 505 U.S. at 165-66. That reading of the historical materials—and the resulting conclusion that the Constitution forbids federal commands to state legislative bodies—has been seriously questioned.[15] But, be that as it may, at least this much is clear: there is

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[14] Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law*, 95 Colum. L. Rev. 1001, 1011 (1995).

[15] *E.g.*, Caminker, *supra* n.14; Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 Kan. L. Rev. 493 (1995); Redish, *Doing It With Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 Hastings L.Q. 593 (1994).

surely no basis for imputing to the Framers an intent to immunize state officials from being called upon to assist in *administering* federal law.

To the contrary, at the Constitutional Convention, Charles Pinkney (whose speech to the South Carolina House of Representatives on ratification the *New York* Court quoted, 505 U.S. at 165), in defending the proposal to have state legislatures elect the members of the United States Senate, stated that the States "are the instruments upon which the union must frequently depend for the support *and execution* of their powers, however immediately operating upon the people and not upon the States." I M. Farrand, *supra*, at 404 (emphasis added). In *Federalist Paper* No. 27, Hamilton developed this thought further. Responding to the concern that the "people will be disinclined to the exercise of federal authority" and that the national government would therefore require "the aid of a military force to execute its laws," Hamilton wrote:

> The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to *employ the ordinary magistracy of each in the execution of its laws.* It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State . . . It merits particular attention in this place, that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive and judicial in each State will be bound by the sanctity of an oath. Thus, the legislatures, courts and magistrates, of the respective members will be incorporated into the operation of the

> national government *as far as its just and constitutional authority extends*; and will be *rendered auxiliary to the enforcement of its laws.* [*Federalist Paper* No. 27, pp. 176-77; first and last emphasis added]

Hamilton returned to this point in *Federalist Paper* No. 36, in responding to the concern that the federal tax power would suffer "from the want of a sufficient knewledge of local circumstances." Hamilton replied:

> But there is a simple point of view in which this matter may be placed that must be altogether satisfactory. The national legislature can make use of the *system of each State within that State.* The method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government. [*Federalist Paper* No. 36, p. 220; emphasis in the original] [16]

What the Framers said before ratification is what they *did* once the Constitution was ratified. As Professor Caminker has shown, numerous early statutes confirm the understanding of the Framers' generation that the States could be enlisted into the service of implementing laws of the new federal government. *See Caminker*, 95 Colum L. Rev. at 1044-45 & nn.170-76. And, while most of these statutes were addressed to judges and judicial personnel, the duties placed upon these persons were executive in nature; the statutes were addressed to the judiciary only because "two centuries ago, state and local judges and associated judicial personnel performed many of the functions today performed by executive officers." *Id.* at 1045 n.176.[17]

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[16] *See also* Madison's comments in *Federalist Paper* No. 45, u. 292 ("it is probable . . . that the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States").

[17] *See, e.g.*, Act of July 20, 1790, 1 Stat. 131 (justice of the peace "required to issue his precept" and " "shall . . . determine" whether a ship is seaworthy); Act of February 12, 1793, 1 Stat. 302 ("it shall be the duty of the executive authority" to cause

Thus, the constitutional materials on which the *New York* Court relied point in precisely the opposite direction here.

(b) Equally to the point, the constitutional value put at risk by the *New York* statute is not threatened by the federal statute here. As Justice Kennedy wrote in *Lopez*, "[t]he theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability." 115 S.Ct. at 1638 (concurring opinion). And, when Congress "commandeers" the state legislative process—as it did in *New York*—the requirement of "political accountability" is severely threatened, as the *New York* Court was at pains to explain. Pp. 17-18 *supra*.

A "ministerial mandate," like the one at issue here, in contrast, simply does not seriously threaten the "distinct and discernable lines of political accountability." The States are *not* being commanded to regulate—let alone commanded to regulate in a particular fashion. To the contrary, the federal government has, by hypothesis, made all of the relevant policy judgments. It stands fully accountable for those judgments. It seeks the assistance of state officials only to assure that the federal policies are implemented in accordance with the congressional plan.

Indeed, the principal injury to state sovereignty which is claimed here is *not* a shifting of political accountability to the CLEOs but the required expenditure of a limited amount of resources on Brady Act investigations when the CLEOs might otherwise expend that money in another fashion. But the constitutional scheme plainly contemplates that one consequence of being part of this Nation is that some amount of a State's resources may have to be expended in ways that the State might not choose were it a

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fugitives to be arrested and extradited); Act of July 6, 1798, 1 Stat. 577 ("it shall be the duty of the . . . courts . . . of each state," upon complaint against a resident alien, "to cause such . . . aliens to be apprehended").

nation onto itself. If the rule were otherwise, States could not be required to open the doors of their courts or their administrative agencies to federal claims, nor could they be required to abide by generally-applicable federal laws. Put differently, the infringement on state sovereignty claimed here is no different that that which was upheld in *Testa, FERC, Fry* and *Garcia* and is a far cry from the infringement claimed in *New York*.

4. It is not necessary in order to dispose of the instant case to go so far as to hold that a mandate to state officials to assist in the administration of a federal law is *always* constitutionally permissible. Rather, it is enough here to hold that such mandates are not *per se* unconstitutional. For if any such mandate is to be upheld, this is surely the one.

To begin with, the mandate at issue here imposes the most minimal of burdens: it requires only a "reasonable investigation" which BATF has defined in a common-sense way. Pp. 19-20 & n. 13 *supra*. Second, the obligation is imposed on local officials who, even if they can waive the State's sovereignty banner, surely have no title to the banner itself. Third, the obligation is time-limited and exists only for an interim period to enable the federal government to develop a national database. And fourth, the obligation furthers a vitally-important federal regulatory interest—an interest which could not be advanced during this interim period without State involvement.

Given all this, it is enough to conclude here that the Constitution does not create an absolute rule which always bars any ministerial mandate and that, in the instant case, the federal interests so clearly predominate as to permit this mandate.

5. We end where we begin. When this Court undertakes to review the constitutionality of a federal statute, it undertakes its most awesome responsibility. That is, perhaps, especially true when dealing with a law like the

Brady Act, which has been the subject of such intense debate within the political branches for so long.

This Court cannot, of course, escape its duty to declare what the Constitution means. But where, as here, the constitutional claim is based not upon the text of the document but upon "postulates" said to be implied from our federal structure, the Court ought to demand the strongest possible evidence before drawing out its own blueprint for such a structure and making it part of the Constitution. Such evidence is entirely lacking here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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